

2003

Ed Ingram dba Ed Ingram Construction v. Brian Kitts and Sunpeak Holdings, Inc. et al. : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

E. Paul Wood; Littlefield & Peterson; Attorney for Appellees.

Scott B. Mitchell; Attorney for Appellant.

Recommended Citation

Brief of Appellee, *Ingram v. Kitts*, No. 20030604 (Utah Court of Appeals, 2003).
https://digitalcommons.law.byu.edu/byu_ca2/4480

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

ED INGRAM dba ED INGRAM CONSTRUCTION, Plaintiff/Appellant, vs. BRIAN KITTS; and SUNPEAK HOLDINGS, INC., et al., Defendants/Appellees.	BRIEF OF APPELLEES Case No. 20030604-CA
---	---

**PLAINTIFF'S APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL
DISTRICT COURT, THE HONORABLE BRUCE LUBECK PRESIDING**

E. Paul Wood (3537)
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, UT 84102
Attorney for Appellees

Scott B. Mitchell (5111)
2469 East 7000 South
Suite 204
Salt Lake City, UT 84121
Attorney for Appellant

FILED
UTAH APPELLATE COURTS
OCT 26 2004

IN THE UTAH COURT OF APPEALS

ED INGRAM dba ED INGRAM CONSTRUCTION, Plaintiff/Appellant, vs. BRIAN KITTS; and SUNPEAK HOLDINGS, INC., et al., Defendants/Appellees.	BRIEF OF APPELLEES Case No. 20030604-CA
---	---

**PLAINTIFF'S APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL
DISTRICT COURT, THE HONORABLE BRUCE LUBECK PRESIDING**

E. Paul Wood (3537)
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, UT 84102
Attorney for Appellees

Scott B. Mitchell (5111)
2469 East 7000 South
Suite 204
Salt Lake City, UT 84121
Attorney for Appellant

LIST OF PARTIES

Plaintiff Ed Ingram dba Ed Ingram Construction

Defendant Brian Kitts

Defendant Sunpeak Holding, Inc.

Defendant Washington Mutual Bank fsb

Defendant Wells Fargo Bank, N.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	4
STATEMENT OF JURISDICTION.	5
STATEMENT OF ISSUES AND STANDARDS OF REVIEW	5
DETERMINATIVE STATUTE	6
STATEMENT OF THE CASE	6
I. Nature of Case	6
II. Statement of Facts	6
SUMMARY OF ARGUMENTS	9
ARGUMENTS	10
I. MR. INGRAM'S RECOVERY OF CONTRACT DAMAGES PRECLUDES RECOVERY OF NSF CHECK DAMAGES	10
II. MR. INGRAM IS MADE WHOLE BY COMPENSATION RECEIVED UNDER COUNT I AND NEGOTIATION OF THE CHECK.	12
CONCLUSION	13
MAILING CERTIFICATE	14
ADDENDUM A	
Order	
ADDENDUM B	

TABLE OF AUTHORITIES

Cases

<u>Angelos v. First Interstate Bank of Utah,</u> 671 P.2d 772, 778 (Utah 1983)	10
<u>Brigham City Sand & Gravel v. Machinery Center, Inc.,</u> 613 P.2d 510, 511 (Utah 1980)	11
<u>Elm, Inc. v. M.T. Enterprises, Inc.,</u> 968 P.2d 861, 863 (Utah Ct. App. 1998)	6
<u>Farmers and Merchants Bank v. Universal C.I.T. Credit Corp.,</u> 289 P.2d 1045, 1049 (Utah 1955)	11
<u>Royal Resources, Inc. v. Gibraltar Financial Corp.,</u> 603 P.2d 793, 796 (Utah 1979)	10
<u>Saunders v. Sharp,</u> 806 P.2d 198, 199-200 (Utah 1991)	5, 6

Statutes

<u>Utah Code Ann. Section 7-15-1</u>	6, 8
<u>Utah Code Ann. Section 38-1-18</u>	8
<u>Utah Rules of Civil Procedure, Rule 8</u>	11

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this Appeal pursuant to Utah Code Ann., Section 78-2a-3(2)(j).

STATEMENTS OF ISSUES AND STANDARDS OF REVIEW

1. Where the Amended Complaint under Count I prays for compensatory damages for breach of contract and Count IV prays that a portion of the same compensatory damages under Count I also be awarded under Count IV for two NSF checks, plus an award of statutory damages, and where one of the checks was negotiated and paid prior to filing the Amended Complaint, did the Court err in granting judgment for the total amount of compensatory damages under Count I, less the paid check and denying recovery under Count IV, on the basis that Plaintiff is fully compensated and elected his remedies. The Trial Court's conclusions of law are reviewable for correctness. Saunders v. Sharp, 806 P.2d 198, 199-200 (Utah 1991). The issues are preserved in the Defendants' Kitts' and Sunpeak Holding, Inc.'s Memorandum in Opposition to Motion for Entry of Judgment (R0294-0309) and the Court's Order (R0371-0377).
2. Where the Settlement Agreement upon which judgment was entered provided for a deduction for all "payment made prior to entry of judgment", did the Court err in interpreting the agreement as allowing compensatory damages under Count I as a "payment" that precluded awarding compensatory damages under Court IV, for NSF

checks. The trial court's conclusion of law are reviewable for correctness. Saunders v. Sharp, 806 P.2d 198, 199-200 (Utah 1990). A trial court's interpretation of an integrated contract is a question of law reviewed for correctness on appeal. Elm, Inc. v. M.T. Enterprises, Inc., 968 P.2d 861, 863 (Utah Ct. App. 1998). The issues are preserved in the Defendants' Memorandum in Opposition to Motion for Entry of Judgment. (R0294-0309) and the Court's Order (R.0371-0377).

DETERMINATIVE STATUTE

Utah Code Ann. Section 7-15-1

STATEMENT OF THE CASE

I. Nature of the Case.

This is an Appeal from the trial court's granting Defendants' Objection to Plaintiff's Motion for Entry of Judgment in the Third Judicial District Court of Summit County, State of Utah.

II. Statement of Facts.

1. Mr. Ingram filed an Amended Complaint, alleging four causes of action: Count I, for breach of contract, for Defendants' failure to pay for labor performed and materials supplied on their residence, asserting damages in the amount of \$54,790.04; Count II, for lien foreclosure; Count III, for breach of contract in the nature of lost profits in the amount of \$18,015.00; and Count IV, for damages under Utah Code Ann. Section 7-15-1, based upon two checks issued by Mr. Kitts to Mr. Ingram for labor performed and materials supplied on the residence, which were returned "NSF" to Mr. Ingram.

Damages prayed for in Count IV were: compensatory damages for the face amount of the checks, \$5,840.00 and \$13,405.07 statutory damages in the amount of \$20,245.07, reasonable attorney's fees and returned check charges (R0050-0063).

2. The NSF checks were issued by Mr. Kitts to Mr. Ingram for labor performed and materials supplied on the residence and are already included in the compensatory damages which Mr. Kitts seeks under Count I. (R0372)
3. Prior to filing the Amended Complaint, Mr. Ingram, in January, 2002, negotiated the \$5,840.00 check for which he claims damages under Count I and Count IV of the Amended Complaint. As a result, Mr. Kitts filed a Counterclaim, alleging recoupment of the check, or set off. (R0074-0082)
4. Prior to trial, Mr. Ingram, Mr. Kitts and Sunpeak Holding, Inc. entered into a Settlement, Release and Indemnity Agreement ("Settlement Agreement") wherein Kitts and Sunpeak Holding, Inc. agreed to pay Mr. Ingram \$68,757.26 on or before March 19, 2003. (R0283-288)
5. Paragraph 11.(b) of the Settlement Agreement states that: "[I]n the event Sunpeak fails to pay Ingram the Settlement Amount as agreed in Section 11.a. herein, Ingram shall be entitled to judgment against Kitts and Sunpeak as prayed for in the Amended Complaint, less sums paid by Kitts and Sunpeak to the date of entry of judgment." (R0284-0285)
6. Mr. Kitts and Sunpeak Holding, Inc. failed to make the payment. (R0280)
7. Subsequently, Mr. Ingram filed a Motion for Entry of Judgment, requesting

that judgment be entered against Mr. Kitts and Sunpeak Holding, Inc. as follows: “Counts I and II, \$54,790.04, plus interest, attorney’s fees and then foreclosure under Utah Code Ann. Section 38-1-18; Count III, \$18,015.00, as lost profits; Count IV, compensatory damages in the amount of \$19,245.07, statutory damages in the amount of \$20,245.07, returned check charges of \$40.00, costs and attorney’s fees under Utah Code Ann. Section 7-15-1.

8. Mr. Ingram’s attorney filed a Affidavit in Support of Costs and Attorney’s Fees, alleging he should be awarded “50% of the gross amount recovered on behalf of the Plaintiff.” (R291-293)
9. Defendants filed a Memorandum in Opposition to Motion for Entry of Judgment (R0294-0309) alleging that the Attorney’s Fees Affidavit was insufficient, as a matter of law; that Mr. Ingram failed to set off the \$5,280.00 check, which was paid; and objecting to entry of judgment for both compensatory damages under Count I for labor performed and materials supplied and compensatory and statutory damages under Count IV, and for NSF checks already covered by Count I, under the theory that Ingram’s Amended Complaint alleging breach of contract elected the remedy of recovery for breach of contract which precluded recovery for the same compensatory damages for the NSF check and also the statutory fees and related attorney’s fees.
10. Mr. Ingram’s Reply in Support of Motion for Entry of Judgment

acknowledged that the compensatory damage figure should have been reduced by the payment of the \$5,840.00 check, acknowledged compromising attorney's fees to a maximum of 25% of damages and, for the first time in any pleadings, announced that Plaintiff was only seeking \$29,704.97 in compensatory damages under Count I and \$19,245.07 under Count IV (which is contrary to the Amended Complaint and all prior pleadings) to enable Mr. Ingram to recover statutory damages in the amount of \$20,245.07. (R0316-0319)

11. After hearing, the trial court sustained Defendants' Objection and denied Mr. Ingram recovery under Count IV. (R0227-0228)
12. The Court entered its Order sustaining Mr. Kitts' Objection to the Proposed Judgment (R0371-0377 and Addendum "A").
13. On the same day, the Trial Court entered Judgment for Mr. Ingram in the amount of \$66,965.04 as compensatory damages under Count I and Count III (R0378-0380).
14. Mr. Ingram timely filed a Notice of Appeal. (R0401-0402)

SUMMARY OF ARGUMENTS

- I. The Court awarding Mr. Ingram compensatory damages, "as prayed" in the Amended Complaint, pursuant to the Settlement Agreement, of \$54,790.04 under Count I, satisfies any claims for compensatory damages under Count IV for NSF checks, and Mr. Ingram's negotiation of the \$5,840.00 check precludes recovery, under Counts

I and IV, as an election of remedies.

- II. The intent of the Settlement Agreement for Mr. Kitts to receive credit for all compensation received by Mr. Ingram “prior to entry of judgment” is accomplished by the Court acknowledging the award under Count I as payment of all compensatory damages due to Mr. Ingram.

ARGUMENTS

I

MR. INGRAM’S RECOVERY OF CONTRACT DAMAGES PRECLUDES RECOVERY OF NSF CHECK DAMAGES

- A. Utah Law on Election of Remedies. With respect to the doctrine of election of remedies, the Utah Supreme Court states:

“The doctrine of election of remedies is a technical rule of procedure and its purpose is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. Said doctrine proposes a choice between inconsistent remedies, a knowledgeable selection of one thereof, free of fraud or imposition, and a resort to the chosen remedy evincing a purpose to forego all others.” Citing Royal Resources, Inc. v. Gibraltar Financial Corp., 603 P.2d 793, 796 (Utah 1979); Angelo’s v. First Interstate Bank of Utah, 671 P.2d 772, 778 (Utah 1983).

An earlier Utah Supreme Court decision provides clarification between the legal principles of election of remedies and satisfaction of a claim:

“The doctrine of election of remedies applies as a bar

only where the two actions are inconsistent, generally based upon incompatible facts; the doctrine does not operate as an estoppel where the two or more remedies are given to redress the same wrong and are consistent. Where the remedies afforded are inconsistent, it is an election of one that bars the other; but where they are consistent, it is the satisfaction that operates as a bar.” (Citations omitted) Farmers and Merchants Bank v. Universal C.I.T. Credit Corp., 289 P.2d 1045, 1049 (Utah 1955).

Under Rule 8, Utah Rules of Civil Procedure, parties may plead inconsistent claims, but cannot recover damages twice for the same loss:

“However, the corollary thereto must be kept in mind, and which has application in this case: that a party cannot have a double recovery for the same loss. Brigham City Sand & Gravel v. Machinery Center, Inc., 613 P.2d 510, 511 (Utah 1980).

- B. Bar to Claim for NSF Checks. In the Amended Complaint, Count I requests compensatory damages of \$54,790.04, and Count IV seeks compensatory damages of \$19,245.07 and statutory damages of \$20,245.07. Mr. Ingram admits that the two NSF checks were issued for labor performed and materials supplied under Count I, for which he is compensated by full recovery under his contract claim. The Settlement Agreement indicates that Mr. Ingram, in the event of Mr. Kitts’ default, would receive judgment “as prayed”. Therefore, Mr. Ingram would very obviously receive a double recovery if the Court allowed compensatory damages under Count I and also under Count IV. Mr. Ingram has attempted to perform a slight of hand trick by simply claiming that he does not want the full damages under Count I but would prefer to be awarded compensatory damages under Count IV, in order for him

to collect statutory damages for the NSF check. However, in all of the pleadings, Mr. Ingram has pursued the inconsistent claims and compensation under the Count I fully satisfies the claim for damages. Additionally, prior to filing the Amended Complaint, in January, 2002, Mr. Ingram, negotiated the \$5,840.00 check, precluding both recovery under both Count I and Count IV for the NSF check.

- i. Satisfaction of NSF Checks. The Court has entered judgment for \$66,965.04 in favor of Mr. Ingram, on Count I, for contract damages of \$54,790.04, plus loss profits of \$18,015.00 under Count III, less payment of the \$5,840.00 check. Mr. Ingram “loss” is fully paid and compensated.
- ii. \$5,840.00 Check. The negotiation by Mr. Ingram of the \$5,840.00 check in January, 2002, prior to the filing of the Amended Complaint, is an election of remedies which prevents his recovery of compensatory damages and statutory damages under Count IV.

II

MR. INGRAM IS MADE WHOLE BY COMPENSATION RECEIVED

UNDER COUNT I AND NEGOTIATION OF THE CHECK

The theory of entering into Settlement Agreement was that Mr. Ingram would receive “judgment as prayed” and would thereby made whole for any loss. This purpose was quantified in the Settlement Agreement by the phrase that “any payment made prior to entry of judgment” would be deducted from any judgment awarded. First, the \$5,840.00 check was negotiated by Mr. Ingram in January, 2002. Mr. Ingram acknowledges the payment for which he should not be allowed to

recover either under Count I or Count IV, in any respect. Second, the compensation, according to the existing judgment, that Mr. Ingram will receive fully and completely compensates his loss of \$54,790.04. The purpose and intent of the Settlement Agreement is carried into effect by the Court applying the principle that compensation under Count I is tantamount to a “payment made prior to Entry of Judgment” under the Settlement Agreement.


CONCLUSION

MR. INGRAM IS BARRED FROM RECOVERY UNDER COUNT IV FOR NSF CHECKS

Mr. Ingram negotiated the \$5,840.00 check, prior to filing the Amended Complaint. Additionally, Mr. Ingram is fully compensated for the \$13,405.07 check by compensatory damages awarded in the Judgment under Count I. Mr. Ingram is not entitled to recover anything under Count IV.

DATED this 15th day of October, 2004.

LITTLEFIELD & PETERSON



E. Paul Wood, Esq.
Attorneys for Appellees Brian Kitts
and Sunpeak Holding, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2004, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEES** to be sent by first class mail, postage pre-paid, to the following:

Scott B. Mitchell
Attorney for Ed Ingram
2469 East 7000 South, Suite 204
Salt Lake City, UT 84121

Darren K. Nelson, Esq.
Parr Waddoups Brown Gee & Loveless
185 South State Street, Suite 1300
PO Box 11019
Salt Lake City, UT 84147



Exhibit A

E. PAUL WOOD - 3537
Attorney for Kitts
and Sunpeak Holdings, Inc.
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435
Facsimile: (801) 575-7834

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH**

<p>ED INGRAM dba ED INGRAM CONSTRUCTION,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>BRIAN KITS; SUNPEAK HOLDINGS, INC.; WASHINGTON MUTUAL BANK fsb ABC Corporation I-V; XYZ Partnerships I-V; and John Does I-V;</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;">ORDER</p> <p style="text-align: center;">Case No.: 010500400 LM</p> <p style="text-align: center;">Judge: Bruce Lubeck</p>
--	---

Plaintiff's Motion for Entry of Judgment and Defendants' Objections thereto came on for hearing before the Honorable Bruce Lubeck, Third District Court Judge presiding on Tuesday, May 28, 2003 at the hour of 9:00 o'clock am. Scott B. Mitchell appeared on behalf of Plaintiff. E. Paul Wood appeared on behalf of Defendants Brian Kitts and Sunpeak Holdings, Inc. Darren K. Nelson appeared on behalf of Defendant Washington Mutual Bank. The Court, having

considered the Memoranda submitted by the parties, the pleadings on file with the Court, and the arguments of counsel, herewith enters its Findings and Conclusions as follows:

1. Plaintiff Ed Ingram filed an Amended Complaint stating four claims for relief: Count I alleges breach of contract based upon Defendants' failure to pay for labor performed and materials supplied on the improvement of the Defendant's real property having a reasonable value of Fifty Four Thousand Seven Hundred Ninety Dollars and 04/100ths (\$54,790.04); Count II, requests foreclosure of a mechanics lien; Count III requests payment of fifteen percent (15%) profit of the compensatory damages alleged in Count I in an amount equal to Eighteen Thousand Fifteen Dollars (\$18,015.00); and Count IV, requests statutory damages under Section 7-15-1 Utah Code Ann. for two insufficient funds checks drawn on the account of Defendants, check no. 181 in the amount of Thirteen Thousand Four Hundred Five Dollars and 07/100ths (\$13,405.07) which, by its terms, is payable for "Lumber and Permit" and check no. 182 in the amount of Five Thousand Eight Hundred Forty Dollars (\$5,840.00), payable by its terms for "Deposit Windows and Tile" ("the Checks").
2. The Checks were written for labor performed and material supplied for which Ingram seeks recovery of compensatory damages under Count I.

3. Ingram and Defendants Kitts and Sunpeak Holdings, Inc. entered a Settlement Agreement whereby Kitts and Sunpeak Holdings, Inc. agreed to pay Sixty Eight Thousand Seven Hundred Fifty Seven Dollars and 26/100ths (\$68,757.26) on or before March 19, 2003.
4. Paragraph 11.(b) of the Settlement Agreement sets forth the remedy for the failure to pay:

“Ingram shall be entitled to Judgment against Kitts and Sunpeak as prayed for in the Amended Complaint, less sums paid by Kitts and Sunpeak to the date of Entry of Judgment.”
5. Kitts and Sunpeak failed to pay the agreed upon settlement amount by the stated date.
6. Ingram filed a Motion for Entry of Judgment seeking payment under all four claims set forth in the Amended Complaint.
7. Defendants Kitts and Sunpeak Holdings, Inc. opposed Entry of Judgment for statutory damages under Count IV on the following theory:
 - a. Plaintiff's Count I for breach of contract includes compensatory damages for labor and materials for which Kitts/Sunpeak Holdings, Inc. wrote the Checks which failed to clear the bank. Section 7-15-1 Utah Code Ann. requires recovery of compensatory damages for the face amount of the Check as a condition of awarding statutory damages. Plaintiff Ingram

elected the remedy of pursuing Judgment for compensatory damages under Count I in the amount of Fifty Four Thousand Seven Hundred Ninety Dollars and 04/100ths (\$54,790.04) which would preclude recovering of compensatory damages under Count IV for the insufficient funds Checks. Under the legal principle of election of remedies, Ingram is precluded from recovering statutory damages under Section 7-15-1 Utah Code Ann.

- b. The language of the Settlement Agreement allows Entry of Judgment against Kitts and Sunpeak “less sums paid by Kitts and Sunpeak to date of Entry of Judgment.” Ingram will recover compensatory damages for labor performed and materials supplied under Count I of the Amended Complaint which qualifies as “sums paid by Kitts and Sunpeak to the date of Entry of Judgment” and prohibit also awarding compensatory damages under Count IV for the insufficient funds Checks.

CONCLUSIONS OF LAW

1. In the Amended Complaint, Plaintiff Ingram elected to pursue and recover compensatory damages for labor performed and materials supplied under a theory of breach of contract set forth in Count I seeking compensatory damages in the amount of Fifty Four Thousand Seven Hundred Ninety Dollars and 04/100ths (\$54,790.04).

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2003, I caused a true and correct copy of the foregoing **ORDER** to be mailed, first class to the following:

Scott Mitchell, Esq.
2469 East 7000 South, Suite 204
Salt Lake City, UT 84121

Darren K. Nelson, Esq.
PARR WADDOUPS BROWN GEE & LOVELESS
185 South State Street, Suite 1300
Salt Lake City, UT 84111

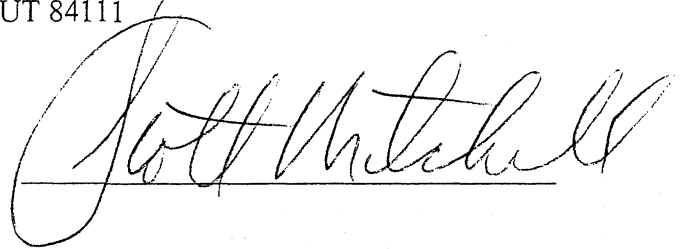
A handwritten signature in cursive script, reading "Scott Mitchell", written over a horizontal line.

Exhibit B

CHAPTER 14

CREDIT INFORMATION EXCHANGE

Section

- 7-14-1. Definitions.
- 7-14-2. Legislative findings.
- 7-14-3. *Information an institution may furnish.*
- 7-14-4. Immunity from liability.
- 7-14-5. Reciprocal exchange of information authorized.

7-14-1. Definitions.

As used in this chapter:

(1) "Depository institution" means any institution authorized by state or federal law to accept and hold demand deposits or other accounts which may be used to effect third party payment transactions. The definition of "depository institution" in Chapter 1 does not apply to Chapter 14.

(2) "Credit reporting agency" includes any co-operative credit reporting agency maintained by an association of financial institutions or one or more associations of merchants. 1995

7-14-2. Legislative findings.

The substantial financial loss to the state and to trade and commerce within this state resulting from the dishonor or other return of checks, drafts, or other orders for the payment of money, including transactions to be consummated by electronic means, requires concerted effort by financial institutions to attempt to minimize the number of such occurrences. The Legislature finds that to facilitate such concerted effort adequate protection against liability of the participating financial institutions is necessary. 1981

7-14-3. Information an institution may furnish.

Any institution doing business in the state may report to any other financial institution, or credit reporting agency the following:

(1) that an account maintained to effect third party payment transactions has been closed out by the institution, the reasons therefor, and the identity of the depositor or account holder;

(2) upon the request of another financial institution any other information in the files of the institution relating to the credit experience of the reporting institution with respect to a particular person as to whom inquiry is made; and

(3) any information concerning attempted or potential activity to defraud a financial institution or to obtain funds from a financial institution by fraudulent or other unlawful means or other information relating to individuals sought by law enforcement authorities for alleged violations of criminal laws. 1981

7-14-4. Immunity from liability.

No depository institution making any report or communication of information authorized by this chapter shall be liable to any person for disclosing such information to any recipient authorized to receive this information under this chapter, or for any error or omission in such report or communication. 1981

7-14-5. Reciprocal exchange of information authorized.

One or more financial institutions may jointly agree with one or more other financial institutions for the reciprocal exchange of any information authorized to be reported by the provisions of this chapter. Such reciprocal exchange of information or the acts or refusals to act of one or more recipients because of such information shall not constitute a boycott or

blacklist, or otherwise be a basis for liability to any person on the part of any participant in the reciprocal exchange of information authorized by this chapter. 1981

CHAPTER 15

DISHONORED INSTRUMENTS

Section

- 7-15-1. Definitions — Civil liability of issuer — Notice of action — Collection costs — Exemptions.
- 7-15-2. Notice — Form.
- 7-15-3. Liability of financial institution upon wrongful dishonor.

7-15-1. Definitions — Civil liability of issuer — Notice of action — Collection costs — Exemptions.

(1) As used in this chapter:

(a) "Check" means a payment instrument on a depository institution including a:

- (i) check;
- (ii) draft;
- (iii) order; or
- (iv) other instrument.

(b) "Issuer" means a person who makes, draws, signs, or issues a check, whether as corporate agent or otherwise, for the purpose of:

- (i) obtaining from any person any money, merchandise, property, or other thing of value; or
- (ii) paying for any service, wages, salary, or rent.

(c) "Mailed" means the day that a notice is properly deposited in the United States mail.

(2) (a) An issuer of a check is liable to the holder of the check if:

- (i) the check:
 - (A) is not honored upon presentment; and
 - (B) is marked "refer to maker";
- (ii) the account upon which the check is made or drawn:

- (A) does not exist;
- (B) has been closed; or
- (C) does not have sufficient funds or sufficient credit for payment in full of the check; or

(iii) (A) the check is issued in partial or complete fulfillment of a valid and legally binding obligation; and

(B) the issuer stops payment on the check with the intent to:

- (I) fraudulently defeat a possessory lien;
- or
- (II) otherwise defraud the holder of the check.

(b) If an issuer of a check is liable under Subsection (2)(a), the issuer is liable for:

- (i) the check amount; and
- (ii) a service charge of \$20.

(3) (a) The holder of a check that has been dishonored may:

- (i) give written or oral notice of dishonor to the issuer of the check; and
- (ii) waive all or part of the service charge imposed under Subsection (2)(b).

(b) Notwithstanding Subsection (2)(b), a holder of a check that has been dishonored may not collect and the issuer is not liable for the service charge imposed under Subsection (2)(b) if:

- (i) the holder redeposits the check; and
- (ii) that check is honored.

(4) If the issuer does not pay the amount owed under Subsection (2)(b) within 15 calendar days from the day on

which the notice required under Subsection (5) is mailed, the issuer is liable for:

- (a) the amount owed under Subsection (2)(b); and
 - (b) collection costs not to exceed \$20.
- (5) (a) A holder shall provide written notice to an issuer before:
- (i) charging collection costs under Subsection (4) in addition to the amount owed under Subsection (2)(b); or
 - (ii) filing an action based upon this section.
- (b) The written notice required under Subsection (5)(a) shall notify the issuer of the dishonored check that:
- (i) if the amount owed under Subsection (2)(b) is not paid within 15 calendar days from the day on which the notice is mailed, the issuer is liable for:
 - (A) the amount owed under Subsection (2)(b); and
 - (B) collection costs under Subsection (4); and
 - (ii) the holder may file civil action if the issuer does not pay to the holder the amount owed under Subsection (4) within 30 calendar days from the day on which the notice is mailed.
- (6) (a) If the issuer has not paid the holder the amounts owed under Subsection (4) within 30 calendar days from the day on which the notice required by Subsection (5) is mailed, the holder may offer to not file civil action under this section if the issuer pays the holder:
- (i) the amount owed under Subsection (2)(b);
 - (ii) the collection costs under Subsection (4);
 - (iii) an amount that:
 - (A) is equal to the greater of:
 - (I) \$50; or
 - (II) triple the check amount; and
 - (B) does not exceed the check amount plus \$250; and
 - (iv) if the holder retains an attorney to recover on the dishonored check, reasonable attorney's fees not to exceed \$50.
- (b) (i) Notwithstanding Subsection (6)(a), all amounts charged or collected under Subsection (6)(a)(iii) shall be paid to and be the property of the original payee of the check.
- (ii) A person who is not the original payee may not retain any amounts charged or collected under Subsection (6)(a)(iii).
- (iii) The original payee of a check may not contract for a person to retain any amounts charged or collected under Subsection (6)(a)(iii).
- (7) (a) A civil action may not be filed under this section unless the issuer fails to pay the amounts owed:
- (i) under Subsection (4); and
 - (ii) within 30 calendar days from the day on which the notice required by Subsection (5) is mailed.
- (b) Subject to Subsection (7)(c) and (d), in a civil action the issuer of the check is liable to the holder for:
- (i) the amount owed under Subsection (2)(b);
 - (ii) the collection costs under Subsection (4);
 - (iii) interest;
 - (iv) court costs;
 - (v) reasonable attorneys' fees; and
 - (vi) damages:
 - (A) equal to the greater of:
 - (I) \$100; or
 - (II) triple the check amount; and
 - (B) not to exceed the check amount plus \$500.
- (c) If an issuer is held liable under Subsection (7)(b), notwithstanding Subsection (7)(b), a court may waive any amount owed under Subsections (7)(b)(iii) through (vi) upon a finding of good cause.

(d) If a holder of a check violates this section by filing a civil action under this section before 31 calendar days from the day on which the notice required by Subsection (5) is mailed, an issuer may not be held liable for an amount in excess of the check amount.

(e) (i) Notwithstanding Subsection (7)(b), all amounts charged or collected under Subsection (7)(b)(vi) shall be paid to and be the property of the original payee of the check.

(ii) A person who is not the original payee may not retain any amounts charged or collected under Subsection (7)(b)(vi).

(iii) The original payee of a check may not contract for a person to retain any amounts charged or collected under Subsection (7)(b)(vi).

(8) This section may not be construed to prohibit the holder of the check from seeking relief under any other applicable statute or cause of action.

(9) (a) Notwithstanding the other provisions of this section, a holder of a check is exempt from this section if:

(i) the holder:

(A) is a depository institution; or

(B) a person that receives a payment on behalf of a depository institution;

(ii) the check is a payment on a loan that originated at the depository institution that:

(A) is the holder; or

(B) on behalf of which the holder received the payment; and

(iii) the loan contract states a specific service charge for dishonor.

(b) A holder exempt under Subsection (9)(a) may contract with an issuer for the collection of fees or charges for the dishonor of a check.

3003

7-15-2. Notice — Form.

(1) (a) "Notice" means notice given to the issuer of a check either orally or in writing.

(b) Written notice may be given by United States mail that is:

(i) first class; and

(ii) postage prepaid.

(c) Notwithstanding Subsection (1)(b), written notice is conclusively presumed to have been given when the notice is:

(i) properly deposited in the United States mail;

(ii) postage prepaid;

(iii) certified or registered mail;

(iv) return receipt requested; and

(v) addressed to the signer at the signer's:

(A) address as it appears on the check; or

(B) last-known address.

(2) Written notice under Subsection 7-15-1(5) shall take substantially the following form:

Date: _____

To: _____

You are hereby notified that the check(s) described below issued by you has (have) been returned to us unpaid:

Check date: _____

Check number: _____

Originating institution: _____

Amount: _____

Reason for dishonor (marked on check): _____

In accordance with Section 7-15-1, Utah Code Annotated, you are liable for this check together with a service charge of \$20, which must be paid to the undersigned.

If you do not pay the check amount and the \$20 service charge within 15 calendar days from the day on which this notice was mailed, you are required to pay within 30 calendar days from the day on which this notice is mailed: